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LOS ANGELES BAR ASSOCIATION

(City and County—Organized 1888)

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The Year's Work

By KEMPER CAMPBELL, *President Los Angeles Bar Association*

Fellow Members of Los Angeles County Bar Association:

Los Angeles County Bar Association has grown during the last seven years from a very modest position among bar groups to one of the largest and perhaps the most active bar association in the United States. Very few of its members, I think, realize the range of its activities and the complexity and multiplicity of the problems which have come to be a part of its daily life. The burdens of the presidency of the Association have correspondingly increased. That you have seen fit to entrust me with a portion of these grave responsibilities is a matter of deepest concern to me. May I take this occasion to say that I am profoundly appreciative of the very high honor that you have conferred. I pledge to the duties of the office my best efforts in the hope that your trust and confidence shall in some measure be justified.

I have been requested by the editor of the *Bulletin* to outline in some detail plans for the coming year. I am glad to do this, with the understanding that what I have to say represents my own personal view, and that the proposals which follow are merely tentative and are subject, of course, to approval by the governing board of the Association,—the Board of Trustees. Suggestions and criticisms will at all times be welcomed, for it is only through a spirit of mutual helpfulness and co-operation on the part of its members that any organization can hope for success. I am encouraged by the following statement in a recently published book: "Of course, everything in this world tends to become organized. Eventually even those who believe in no organization at all must form a Society for the Promotion of Disorganization if they wish to accomplish anything."

We are living in a crowded and crowding age. We lead a hurried and harrowing existence. There is no calling so subject to the compulsion of the necessities of mankind as is ours. There is no vocation that has upon its desk so much unfinished work. Fortunately, in spite of the pressure of these pragmatic times there is growing stronger and stronger the realization that the practice of the law is not a trade, not a business, but a profession. Its object is not to make a living, but to make lives worth living. We have come to feel that members of our profession are ministers in the temple of justice and not merely alms seekers upon its steps.

ADMINISTRATION OF JUSTICE LAGS

It is the united opinion of the bar, the bench and the public in America that the administration of justice in this country leaves much to be desired. For the revitalization of the judicial arm of the government many far-reaching reforms have been proposed, and be it said to the credit of our profession, they have come not from the laity, but from the bench and bar of this commonwealth. I shall later on mention a few of these proposals, but suffice it to say here, the primary purpose of the organized bar is to contribute to the administration of justice. This being a public function, it can only be accomplished by public understanding. Therefore, bar association endeavor logically divides itself into two fields: first, the qualification of the bar itself for the task in hand, and secondly, its co-operation with the public in the accomplishment of its objectives.

DEMOCRATIC SPIRIT NEEDED

To fit ourselves for the work before us we must first of all encourage and develop to the utmost a thoroughly democratic spirit. I have the greatest confidence in the opinions and conclusions of the entire bar. This confidence has been amply justified by past experience—for example, time after time the

bar has passed its judgment upon candidates for the bench, and the impartial appraisal of qualifications of aspirants to judicial office is an accomplishment of which this organization can well be proud. During the past seven years, out of fifty-six judicial candidates approved by the Bar Association, fifty candidates were elected or appointed. Last year twelve out of thirteen of those approved by the Bar Association were elected. The public is gaining a well merited confidence in the sincere desire of the bar to be of service. "Rome was not built in a day." I am not impatient that in rare instances a few outstanding members of the bar have seen fit to register public dissent from the almost unanimous voice of their brethren. We lawyers, as a class, are men of strong convictions trained in the art of dissension. I fully realize that it is more difficult for members of the bar to develop an esprit de corps, to recognize the doctrine of "majority rule" than it is for those of other and less contentious callings. It may be a very effective political move for a candidate to solicit the approval of fifteen members of the bar whose names are most frequently in the public prints and who are known, perhaps, collectively to more voters than all of the other members of the bar put together, and to circulate this list of endorsements and to publish and re-publish these well known names in his behalf. But I do not believe that outstanding members of the bar who have the responsibility of public respect and confidence will long continue, even in good faith or in the zeal of advocacy, to lend themselves to the frustration of the idealistic endeavors of their professional brethren as indicated by repeated and overwhelming votes of the members of the bar. We can accomplish nothing except by organization. Organization is futile unless the individual is willing to submit his own preference to the will and judgment of the majority. It is possible that upon rare occasions an error will be made by our organization. It is more than probable—it is a certainty—that without the influence of the majority opinion of the Bar Association as registered in its plebiscites, many mistakes will be appointed and re-elected. But let us develop a spirit of tolerance. I like the way Hendrik Van Loon has expressed it:

> "The men who have fought for tolerance, whatever their differences, had all of them one thing in common; their faith was tempered by doubt; they might honestly believe that they themselves were right, but they never reached the point where that suspicion hardened into an absolute conviction.
>
> "In this day and age of super patriotism, with our enthusiastic clamoring for a hundred per cent this and a hundred per cent that, it may be well to point to the lesson taught by nature which seems to have a constitutional aversion to any such ideal of standardization. Purely bred cats and dogs are proverbial idiots who are apt to die because no one is present to take them out of the rain. Hundred per cent pure iron has long since been discarded for the composite metal called steel. No jeweler ever undertook to do anything with hundred per cent pure gold or silver. Fiddles, to be any good, must be made of six or seven different varieties of wood.
>
> "In short, all the most useful things in this world are compounds and I see no reason why faith should be an exception. Unless the base of our certainty contains a certain amount of alloy of 'doubt' our faith will sound as tinkly as a bell of pure silver or as harsh as a trombone made of brass."

We cannot hope for perfection, but we can hope for progress. Progress, or even success, is not a goal or *fait accompli*, but the direction in which we march.

LAWYERS SEEK TO SERVE

Through my fourteen years connection with the Law College and my subsequent Bar Association work and other activities, I suppose it is my privilege to know the bar of Los Angeles County as well as any other member of our Association. It is a pleasure to me to take this opportunity to testify to the wonderful spirit of idealistic service that characterizes the lawyers of this county. I have conducted several campaigns to increase the membership of our Association and of the California Bar Association. In the

KEMPER CAMPBELL, *President Los Angeles Bar Association*

first campaign I emphasized the benefits that would accrue to the prospective member by affiliation with the Association. Later on, and particularly during the past two years, the appeal was entirely reversed. I found, greatly to my surprise and gratification, that lawyers were interested not so much in what they could get for themselves, but what they could give to their profession. It is only necessary to say to lawyers, "Here is an opportunity to render service." Last year seven hundred of our members volunteered for committee work. Illustrating the character of service rendered by our numerous committees, let me quote concerning one of them from the last annual report of the Secretary:

> "It will be of interest to members to note that at the present time there are forty-seven members whose names appear on the Public Defender's Civil List. During the period from January 1, 1926, to January 1, 1927, 1899 matters were referred by the Public Defender to attorneys on the Civil List; and during the period from August 1, 1914, when the Public Defender's list was instituted, to January 1, 1927, 17,933 matters were referred to various attorneys who from time to time have assisted in this splendid work, a very large part of which is of a charitable nature."

Already scores and scores have kindly offered to contribute of their time and efforts to the work of the Association. Within the next few days a card will be sent to the members for indication of preference of committee assignments. We should all be very proud to belong to a profession whose members are animated to such a marked degree with a spirit of co-operation and helpfulness and what Elihu Root is wont to term "the commendable predilection for quasi public service. Although the rewards of such service consist chiefly of the satisfaction in deeds well done, I can assure you in advance the appreciation and gratitude of the officers of the Association and that appropriate and timely acknowledgment will be made.

THE VOICE OF THE BAR

The Bar Association is becoming articulate. It has in recent years spoken out clearly and emphatically in condemnation of legal practices that are oppressive or inadequate. It has developed a commendable fearlessness to which the public and the press have given a most gratifying response. I sincerely trust that means will be found to more fully convey to the public an understanding of our ideals and purposes. To this end, I shall recommend that a speaking campaign be conducted throughout the year. Speakers to the number of forty or fifty will be selected who will be the duly accredited spokesmen of the Association. Data will be furnished them so that certain definite and authorized statements may be made, explaining the purposes of our organization and the various departments of its work, as well as the reforms which we espouse in our efforts to raise the standards of the bar, the bench and the administration of justice. There are over one thousand organizations or groups of citizens holding regular meetings in this county. Substantially all of these will be more than willing to listen to our representatives.

AID OF PRESS APPRECIATED

We are indeed particularly grateful to the newspapers of this community. With slight exception, they have been quick to recognize the sincere effort we are making for the common good. They have been extremely generous in giving us news space and editorial commendation of our work.

POLITICS RIGIDLY EXCLUDED

We are frequently requested to declare ourselves upon matters of public interest not connected with the administration of justice. I have been, and shall continue to be, unalterably opposed to any such declarations. We have in our membership outstanding leaders of all shades of political, religious and social affiliations. Wherever you find an organized group in any department of public activity there you will find among its leaders members of the bar. Our only hope of ultimate success in what we are striving to accomplish is to preserve our organization free from differences of politics or other public controversial matters outside of the particular

realm of our profession. Notwithstanding our diverse beliefs and temperaments, we are in entire accord and of one mind as to the ideals and aspirations of our own profession. To preserve this unity and to attain the full measure of public confidence we must confine the activities and pronouncements of our Association to the matters in which we are looked to for public leadership.

In the work of strengthening the moral fiber of our profession, the matter of discipline should receive our most careful attention. Those who have served upon the Grievance Committee in the past deserve our highest commendation for the painstaking care with which they have investigated complaints against lawyers. The burdens of this committee have grown very heavy. I have given the work of this committee some study and I believe that it can be materially simplified and expedited by the automatic rotation and assignment of cases and by the appointment of a number of Grievance Committee assistants who will undertake the labor of interviewing complainants and putting complaints in form and marshalling the evidence for presentation or making specific recommendations as to further disposition.

GREATEST NEED IS EDUCATION—NOT PUNISHMENT

I have been profoundly impressed during my several years experience on the Board of Trustees with the fact that the underlying need was not so much one of punishment, but of education. Practically all of those against whom complaints are made are men poorly equipped mentally to become lawyers. Seldom, if ever, do we find a man accused of wrong-doing who has had an appropriate educational background. One who has spent four years in a college of liberal arts and three years in a law college, or has gained elsewhere an equivalent training, has become so saturated with the atmosphere of books, with the idealism of learning, and with standards of conduct dissociated from commercialism that he inevitably responds to the ethical standards of the legal profession. Men who are ill-prepared and ill-fitted to render adequate service to their clients soon find themselves in financial stress. In the absence of the ideals which only books can give, in the absence of the ideals which only intellectual and moral training can afford, they succumb to temptation, bring disgrace upon themselves and disrepute to an honorable calling. In former days the professions embraced the educated men of the community and the respect given to them was given by a people ignorant for the most part and unlettered, but today, when logarithms are expounded and dead languages translated at every crossroad, a profession must deserve the respect it hopes to achieve and must merit it from an enlightened and educated community.

I sincerely trust that the bar will some day rank educationally with other professions. It would not be fair to raise educational prerequisites too suddenly to the disadvantage of those who are now engaged in the regular study of law, but the adequate preparation for their life's work of those who essay to engage themselves in a learned profession is a consummation devoutly to be wished and until it is accomplished we cannot expect a great measure of success in raising the moral standards of the bar. However, substantial improvement can be made in the ethical tone of the bar by the constant reiteration to men now practicing of those ethical principles that ought to be known to all, but which, particularly with the unlettered lawyer, are more honored in the breach than in the observance. When the establishment of our legal publication, the *Bulletin*, was recommended several years ago by a committee of the Board of Trustees, the most important function which it was felt could be performed by such a publication was the inclusion in each issue of at least one page devoted to the discussion of actual or hypothetical cases illustrating the proper conduct of lawyers under specified circumstances; in other words, the case book method of teaching legal ethics. It was thought, in view of the many opinions ren-

dered by our own Ethics Committee and our Committee on Grievances, abundant material would be at hand. Giving all due credit to the marvelous character and educational value of the *Bar Association Bulletin*, as so ably conducted by its editor, I still feel that a department of ethics should be added to its columns and should be assiduously cultivated and maintained, for after all we are more vitally interested in raising the moral standard of the bar than we are in any other of our many endeavors. Moral worth is the foundation of our structure and moral responsibility the keystone of the arch.

Fraternity Aids Reform

It is noticeable that in metropolitan centers derelictions in the legal profession are more frequent and pronounced. In rural communities disciplinary measures are seldom, if ever, needed. In the latter places members of the bar are known to each other and to the citizenry. This acquaintance and this public knowledge are most potent deterrents to the erringly inclined. This being so, it would behoove us to do what we can to bring to the metropolitan bar such a degree of mutual acquaintance and public contact as may be reasonably possible. One of the many reasons for the high standard of the twenty-five hundred London barristers is the fact that they all have their offices or "chambers" in the Inns of Court, where they mingle daily in closest fraternity. They know each other. It is a human trait to desire and to seek the respect and commendation of our associates. In this "city without end" it is an unfortunate fact that members of the bar are acquainted with comparatively few of their fellows. In the face of numerous social demands and occupations, it is exceedingly difficult for lawyers in a community such as this to find the time for social intercourse with each other. I believe, however, that if members of the bar can be made to realize that it is a distinct service to their profession to mingle and become acquainted, they will be willing to devote such time as may be necessary to that end. With this in view, and subject to the approval of the Trustees, I desire to appoint two committees, one to be known as the Attendance Committee, consisting of perhaps fifty members, the duty of each member being to encourage the attendance upon our meetings by telephone message or other special invitation of a certain limited number of other members whose names shall have been assigned. I shall ask also the privilege of appointing a "Fraternity Committee" of some forty members whose duty and privilege it shall be to attend the meetings of the Association, extend a welcome to the members and guests upon arrival, and to assist in an appropriate manner in the encouragement of a spirit of interdependence among members of the bar.

Bar Association Building

Nothing would better promote the solidarity and fraternity of the bar than the erection of a Bar Association building wherein the offices of the Association could be maintained, a branch law library established and conducted by the county without charge to the legal profession, and a sufficient number of representative lawyers housed to form a nucleus for the growth of a true fraternal spirit. A committee has been studying this proposal for some time and it would seem from the investigation thus far made that such a project is not only highly desirable from a professional point of view, but will be successful financially. Saving in library space, rates of rent, time consumed in going to the offices of other lawyers for consultation, are but a few of the economies that are possible. A co-operative messenger service for the delivery and filing of papers, telephone exchange service with corresponding decrease in overhead, combination reception room facilities and other attractive features are also proposed. This matter will have further study and the advice and suggestions of the members solicited. It is my personal hope that before the conclusion of this year ground will actually be broken for the erection of a Bar Association building.

(Continued on Page 26)

Clearing the Air for Commerce*

By W. JEFFERSON DAVIS *of the San Diego Bar*
Former War Department Legal Advisor in Europe

The American Congress has at last underwritten the "fourth estate" of transportation. It has written the Bill of Rights of the new commerce—the commerce of the air. The legislation was rather belated, but now that it is on the statute books, it atones, partially, for the legislative laggardness of the past, and offers to American capital virtually an uncharted field as limitless as the skies.

There is no popular conception as yet of the scope and potentiality of the "Air Commerce Act of 1926," known before its passage by Congress and approval by President Coolidge as the Bingham-Parker bill. This act put the government to the task of encouraging and developing commercial aviation, but without the intervention of a direct government subsidy. Our government has shied rather consistently from direct subsidies, although European nations are not so aloof.

But it must be admitted that European nations, although they did not invent the airplane, have outstripped the United States in its utilization. Their passenger, freight and air mail lines in operation today demonstrate that fact.

That we are a pioneer, yet a novice, in this game of aerial transportation, may be illustrated in a paragraph. While Europe has been carrying on intensively in the air of commerce, our activities mainly have been confined to a few air mail routes, none of them self-sustaining. Practically no mail route is self-sustaining, whether a rural delivery or an overland express, but the "O. K." of Uncle Sam on an aerial mail delivery route presumably should bring enough "side business"—if you want to call it that—to make the whole project pay.

But the trouble has been, prior to the legislation just enacted, that the whole system of transportation by air in the United States has been on the "stagger stop" basis. After having invented the airplane, America sidetracked it and left it in an orphanage hangar. Only when she saw her child on parade, in charge of a foreign nurse within the past year or so, did the mother country grow jealous.

Then came the Bingham-Parker bill, and the resultant Air Commerce Act, after the Senate and House differences had been adjusted. It is the greatest step toward the full development of American transportation since the passage of the Interstate Commerce Act, creating the Interstate Commerce Commission, and the National Good Roads Law of 1916, which has made automobile travel a soft-cushioned pilgrimage rather than a shake and a shiver, and a detour.

The Interstate Commerce Commission today not only regulates interstate transportation by railroads—the common carriers which were granted certain government subsidies in their earlier days, as commercial aviation now must receive direct or indirect government aid—but the travel by motor buses has reached such interstate proportion that the commission recently has taken cognizance of this means of transportation by land.

It scarcely intrigues the imagination of any

*EDITOR'S NOTE: This is the first of a series of valuable and instructive articles which the *Bulletin* has secured on recent legislation and legal problems pertaining to aerial navigation. In subsequent issues will appear "Federal Regulation of Flying," by Thomas Hart Kennedy, and "Legal Control of Aerial Navigation," by Meredith Perry Gilpatrick. Each of these writers has made a detailed study of and is an authority on his subject. Mr. Davis, author of the present article, is a member of the Air Law Committee of the American Bar Association.

American, and it does not conscript the foresight of a Jules Verne, to visualize the time when air transportation will be so vital to the nation's defense and its commerce, that there must be created a government body which possibly will be known as the "Interstate Air Commerce Commission."

No one commission, assuredly, could encompass in its regulatory authority the network of American railroads, motor buses and thousands of airplanes—passenger, mail and freight—flying in the never-never land of the air.

The Bingham-Parker bill, approved by President Coolidge near the close of the last session of Congress, is a far-reaching step toward the encouragement, rather than the subsidization, of commercial aviation in the United States. If there is subsidy in it, the disguise is so excellent that even the ancient enemies of a "ship subsidy" in the Senate and House didn't smell the essence of danger in the air. Indeed, there is no danger. Today our country probably is the only recalcitrant among the more important countries, which concerns itself about subsidies to the real transportation of the immediate future.

The United States has never subscribed to the Prague Air Code, nor the basic principles of the International Air Navigation Convention of 1919, yet many of their fundamental principles must be utilized in connection with the regulations which the Department of Commerce has just issued, following the passage of the Air Commerce Act.

The new law gives the business of commercial aviation a legal standing—something it has never had. It provides a uniform system for the licensing of pilots and planes. Even the "gypsy" aviator, who flies from one state fair to another and takes up passengers for "the thrill which comes once in a lifetime," is amenable to the new code of the air.

In effect, the Department of Commerce will supervise airplane routes, permits and flights, much as it controls today the licensing of steamboats and the regulation of radio.

"Let Hoover do it," has been a sort of

"buck-passing" by-word during both the Harding and Coolidge administrations. Secretary Hoover, known as the Secretary of Commerce, has broad shoulders, and he never shrugs nor droops them when a new job comes along. Under the legislation just approved by Congress, the Secretary of Commerce is given "the duty" of fostering air commerce in accordance with the act, and, among other things:

To encourage the establishment of air ports, civil airways, and other air navigation facilities;

To make recommendations to the Department of Agriculture as to necessary weather service;

To study the possibilities of the development of air service; to advise with the Bureau of Standards and other government agencies; to investigate and report on aerial accidents; to provide for the registration of aircraft as to their airworthiness; to provide for the periodic examination and rating of airmen serving in connection with aircraft of the United States; to provide for and establish traffic rules for the navigation, protection and identification of aircraft, including rules as to safe altitudes of flight, and rules for prevention of collisions between vessels and aircraft.

In other words, the new aircraft inspection and regulatory law is as comprehensive as existing statutes giving the Secretary of Commerce authority to make inspections of steamboats, and to issue or revoke licenses therefor, or the law giving this same Secretary control of the wave lengths in radio communication. Many kinks are to be straightened out, but a decided step both toward federal regulation and federal aid has been made. That these rather haphazard requirements, enacted by Congress in a general treatment of a comparatively new subject, must be fitted into the law of the nations, as proposed in a convention which this government has never yet ratified, is as inevitable as that the states fell into line a decade ago when the first Federal Good Roads Law was put on the statute books.

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Liabilities and Obligations of Sellers of Personal Property

By ROBERT P. JENNINGS *of the Los Angeles Bar*

(Continued from issue of February 17, 1927)

There are two warranties binding upon a manufacturer who sells his own manufactured product:

"MANUFACTURER'S WARRANTY AGAINST LATENT DEFECTS. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials." (Civil Code, sec. 1769.)

"THING MANUFACTURED FOR PARTICULAR PURPOSE. One who manufactures an article under an order for a particular purpose, warrants by the sale, that it is reasonably fit for that purpose." (Civil Code, sec. 1770.)

These warranties apply to manufacturers alone, and not to dealers. In the case of *Loucks v. Morley*, 39 Cal. App. 570, in discussing this matter, it is said:

"In some of the common law cases, it is said that where a 'manufacturer' or 'dealer' contracts to supply an article for a particular purpose, there is an implied warranty that the article is reasonably fit for that purpose. * * * In this state, however, the principle does not extend to 'dealers,' but is restricted to 'manufacturers.'"

The court then solemnly held that a restaurant keeper, even though by mixing ingredients and cooking them, he produces a particular article, is not a manufacturer in any true sense of the word, and therefore does not come within the purview of these warranties.

The warranty that one who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose, does not apply, even though the seller manufactures the article, unless it was manufactured *under an order for a particular purpose.* If the seller is engaged in the manufacture of an article and the buyer simply buys one of such articles, then there is no warranty under Section 1770. This matter is made clear and the difference between Section 1770 and Section 1769 is pointed out by our Supreme Court in the case of *Remsberg v. Hackney Manufacturing Co.*, 174 Cal. 799. In that case, the plaintiff purchased a Hackney auto plow from the defendant. The farmer sought to rescind the sale on account of breach of warranties accompanying the sale. Regarding these matters, the Supreme Court says, at page 803:

"At the trial the plaintiff seemed to place his reliance, in part at least, upon section 1770. His rejection of the machine was based upon its failure to do the work for which plaintiff desired to use it. But the contract was not such as to bring the case within the purview of section 1770. The article was not manufactured for the plaintiff under an order for a particular purpose. It was not manufactured under order at all. The defendant was in the business of manufacturing and selling an article known as the Hackney Auto Plow, and the plaintiff bought one of these articles by description. The warranties defined in section 1769, i. e., that the implement was free from any latent and undisclosed defect arising from the process of manufacture, and that the manufacturer had not knowingly used improper materials therein, were implied in the contract, but there is neither allegation nor finding that these warranties were broken, and the evidence would not support such a finding. The finding that the machine was 'defective both in material and workmanship' does not meet the requirements of section 1769."

The court, however, then proceeds to point

out that although in such a case there is no implied warranty of fitness for the *particular* purpose for which the purchaser designed to put the article, yet, apparently, there is an implied warranty of fitness for the *general* purpose for which articles of the kind are designed to be used, saying, at page 805:

> "The extent of the implied warranty in such a case is that the machine, too, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do." (See, also, *Hawley Furnace Co. v. Van Winkle Gin Works*, 4 Ga. App. 85, 60 S. E. 1003.)

> "Mr. Williston, in his work on Sales, suggests, and we think rightly, that the implied warranty of fitness for the general purposes for which the article is made and sold is a phase of the warranty of merchantability. 'The principle already laid down that a manufacturer impliedly warrants his goods to be merchantable includes, therefore, the doctrine sometimes stated in this way—that the manufacturer of goods impliedly warrants that they are reasonably fit for the general purpose for which they are manufactured."

A close distinction has been drawn, however, between those cases in which there is a contract of sale of the manufactured article and those cases in which there is a contract simply for work and labor to be expended in the manufacture of an article on specifications furnished by the buyer. In the one case — that of the sale — the warranty applies, but in the other case it does not apply. This distinction is pointed out by the Appellate Court in the case of *United Iron Works v. Standard Brass Casting Company*, 69 Cal. App. 384. In that case, the plaintiff manufacturer agreed to furnish and cast for the defendant, the buyer, certain lead fittings at so much per hundred pounds. The buyer was to deliver all of the materials necessary to make the fittings; all metal and scrap remaining, after completion of the job, were to be returned to the buyer; and the fittings were to be manufactured on special order of the buyer in accordance with blue prints and specifications furnished by the buyer.

Regarding this situation, the Appellate Court, at page 389, says:

> "The weight of authority is that a contract to manufacture a special article for a special purpose in accordance with plans furnished by the purchaser is a contract for work and labor, particularly if the article manufactured is not suitable for sale in the general market in the ordinary course of the manufacturer's business and the purchaser furnished the materials. (See *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 231 (52 Pac. 496); *Mannix v. Tryon*, 152 Cal. 31, 40 (91 Pac. 983); *Spencer v. Cone*, 42 Mass. (1 Met.) 283.

> "Under the foregoing authorities it would seem to follow that if the appellant had been engaged in the business of making lead castings of the particular design covered by this contract for the general market, then the rule of the Golden Eagle Milling Company case might apply, but it appears that such was not the fact, and, further, that this contract covered a special order for a special purpose in accordance with plans and specifications furnished the appellant by the respondent and which, in turn, were received by the respondent from the New Cornelia Copper Company of Ajo, Arizona, with whom the respondent had a contract for the delivery of the castings after their manufacture. The rule of Flynn v. Dougherty covers the case and the contract must be held to be one for work and labor and not one of sale. The implied warranty in section 1770 of the Civil Code is not, therefore, applicable."

Also, it is to be noted that the warranty as to fitness is not an absolute warranty, but simply a warranty of reasonable fitness. In another case, that of *Ingle Manufacturing Company v. San Diego Oil Products Company*, 67 Cal. App. 458, this is pointed out. In that case the seller had agreed to manufacture and sell to the plaintiff certain metal tanks for storage of oil. The tanks leaked slightly and a breach of the warranty of fitness was claimed, but the Appellate Court says, at page 460:

> "The warranty contained in section 1770 of the Civil Code, covering the manufac-

ture of articles in the class in which the subject matter of this action falls, is to the effect that these tanks were guaranteed by the manufacturer to be reasonably fit for the purpose for which they were made. As shown by the findings, considering the fact that the tanks leaked only to the extent of 295¾ gallons, which was less than one-tenth of one per cent of the aggregate of 342,627 gallons of oil contained in the tanks during their use of about four months; or, to put the matter more concretely, about one drop out of 16,000 drops in a one week's storage of oil—the conclusion by the lower court that the tanks did comply with the terms of the contract between the parties, as well as with the warranty as contained in and required by the provisions of section 1770 of the Civil Code, does not seem entirely unreasonable."

The same point was made and sustained by the Appellate Court in the case of *Walsh v. Silveria*, 25 Cal. App. 717, in connection with the sale of a supposedly fireproof safe. The safe, instead of being absolutely fireproof, was, upon being subjected to the fierce heat of an unusual fire, destroyed and its contents also damaged. The Appellate Court, however, says, at page 722:

> "The case of the defendant and cross-complainant, insofar as it concerned the alleged breach of the statutory warranty, given by section 1770 of the Civil Code, that the safe was reasonably fit for the purpose for which it was sold, was rested upon proof of the fact that the safe was destroyed and its contents damaged by fire. This undoubtedly was evidence that the safe was not actually fireproof, but such evidence was neither controlling nor conclusive upon the issue as to whether or not the safe was reasonably fit for the purpose for which it was sold. Upon this phase of the case expert witnesses for the plaintiff and cross-defendant testified in effect that the safe in controversy was reasonably fireproof, and that neither it nor any other so-called fireproof safe could go through the fierce flames of an extraordinary fire such as occurred in the present case, without serious damage to the safe and its contents. In brief, the best that

can be said for the defendant and cross-complainant is that the evidence upon the issue under discussion was in substantial conflict. . . . "

Also, it has been pointed out by the Supreme Court, *United Iron Works v. Outer Harbor Dock & Wharf Co.*, 168 Cal. 81, that the warranty of fitness applies only to the particular purpose designated by the buyer at the time he purchased.

Cases might be multiplied bearing upon these sections of the code, but enough has been said to show the general extent and character of the manufacturer's implied warranties upon sale.

There are two other warranties which refer to sales of marked or trade-marked articles:

> "One who sells or agrees to sell any article to which there is affixed or attached a trade mark, thereby warrants that mark to be genuine and lawfully used." (Civil Code, sec. 1772.)
>
> "One who sells or agrees to sell any article to which there is affixed or attached a statement or mark to express the quantity or quality thereof, or the place where it was, in whole or in part, produced, manufactured, or prepared, thereby warrants the truth thereof." (Civil Code, sec. 1773.)

These warranties seem to be self-explanatory, and no decisions in this State have, apparently, arisen thereunder. The latter would seem, possibly, to be a forerunner of our present Pure Food Law.

Another implied warranty is that which follows the sale of a written instrument of a certain kind. This warranty is to the following effect:

> "One who sells or agrees to sell an instrument purporting to bind anyone to the performance of an act, thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause." (Civil Code, sec. 1774.)

It will be noted that this is simply a warranty that the seller has no knowledge of any of these facts. It is not a warranty that the facts do not exist. The section originally, when enacted in 1872, contained a further provision to the effect that the seller warrants the instrument to be what it purports to be, and to be binding, according to its purport, upon all parties thereto; but this provision was stricken out by amendment two years later in 1874.

It was held in an early case, *James v. Yaeger*, 86 Cal. 184, that the warranty provided for by this section of the code applies only to the transfer of paper in due course and to an innocent taker. The Supreme Court says:

> "This must be so necessarily, else all the legislation for the protection of an innocent holder of commercial paper, as between him and his assignor, would be unnecessary, and an endorser with knowledge would be protected equally with a purchaser for value and without notice."

The warranty is not to be extended beyond its plain terms. In the case of *Sutro v. Rhodes*, 92 Cal. 117, the plaintiff sold to the defendant certain bonds issued by the County of Calaveras, but these bonds were an over-issue not provided for by the Enabling Act, and in excess of the amount which could be legally issued. They, however, were regular on their face, signed by the proper officers, although they were in truth invalid. The Supreme Court held that the plaintiffs were, nevertheless, entitled to recover the purchase money, and after saying that there was no express warranty of the legal validity of the bonds, proceeded to lay down this rule:

> "Neither was there any implied warranty. Section 1764 of the Civil Code provides that, 'except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty'; and none of the other sections of the article applies to the case at bar, except section 1774. And this section not only shuts out any claim of warranty in the present case, but it seems to exclude the authorities marshaled by appellant to the point that upon some principle of law—as, for instance, failure of consideration—he ought

to recover in this action. The section is as follows: 'One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.' The transaction between respondent and appellant was not the assignment of a debt, as the transfer of a non-negotiable obligation is sometimes construed to be; it was the sale of an instrument within the meaning of the code, and the section just quoted is the law upon the subject. It seems to be an express declaration and warning to purchasers of such instruments that the rule of *caveat emptor* applies, and that they must examine for themselves, and exercise their own judgment, or take a guaranty." (Page 123.)

The same rule was laid down by the Supreme Court in a later case of *Harvey v. Dale*, 96 Cal. 160. It seems that the plaintiff brought suit upon a promissory note, which had been given in the purchase of a bond of a private corporation. Apparently, the necessary steps to warrant the issuance of the bond had not been taken, as required by the statute, and the bond in question was invalid. The Supreme Court refers to the above stated case of *Sutro v. Rhodes*, saying, at page 161:

> "Upon the principles of that case we must hold that the defendant herein cannot resist the payment of the note sued upon. He got from the plaintiff exactly what he intended to buy and did buy, viz: one of the bonds of the corporation. He had the same opportunity as the plaintiff to ascertain the steps that had been taken by the corporation in the issuance of the bonds, and whether he made such examination or not, be bought subject to the rule of *caveat emptor*, and assumed all the risk of its invalidity when he accepted the bond in exchange for his promissory note."

(To Be Concluded)

Case Notes*

ALBERT E. MARKS *of the Los Angeles Bar*

INSURANCE LAW: DISTINCTION BETWEEN THE ASSIGNEE OF A LIFE INSURANCE POLICY AND THE BENEFICIARY.

One Clark insured his life for $5000 making the policy payable to himself, his executors, administrators, and assigns. Subsequently, Clark made a formal assignment of the policy by way of gift to one Eva Powell, a lady friend. The assignment was received by the home office of the insurance company, returned to the local agent and then attached to the policy. The right was reserved to cancel the assignment without notice to or consent of the assignee. The assignee was never notified and knew nothing of the assignment. Clark executed a will in which his sister was named as principal beneficiary; no mention was made of the policy or of its assignment. The assignment, however, had never been cancelled. Upon Clark's death, the insurance company brought an action of interpleader to compel Clark's sister and Miss Powell to litigate between themselves their respective rights to the $5000. *Held*, that the assignment of the life insurance policy by way of gift was incomplete and vested no rights in the intended donee. *Mutual Benefit Life Insurance Co. v. Clark* (March 1, 1927), 52 Cal. App. Dec. 611.

It is well settled that an assignment of a chose in action by way of gift, whether *inter vivos*, or *causa mortis*, is incomplete unless the donor unequivocally divests himself of all control and dominion over the subject of the gift and delivers the same to the donee. *Knight v. Tripp*, 121 Cal. 647; *Collins v. Maude*, 144 Cal. 289; Sections 1147 and 1148, Civil Code.

The more interesting portion of the opinion deals with the merits of the contention of Miss Powell that the purported assignment operated only as a change of the beneficiary. The court then discusses the distinction between the assignee of a policy and the beneficiary thereunder.

An ordinary life insurance policy gives to the insured both the right to make an assignment of the policy and also the right to change the beneficiary. Generally, the policy will also provide that the right to change the beneficiary is present only where no assignment of the policy has been made.

"Where a person places insurance upon his own life, he is the owner of the policy, and when the policy is made payable to the insured or to his own estate, as is the case with the policy under consideration, it is undoubtedly a contract made by the insured with the insurance company for the benefit of the insured, and, as such, is a chose in action and is capable of being transferred or assigned. If the insured assigns such a policy he thereby ceases to be a party to the contract of insurance and the assignee becomes the owner and takes the place of the insured in the contract of insurance." (52 Cal. App. Dec. 611, 615.)

But where the policy names a third person as beneficiary, this "beneficiary" is not a party to the contract, but the contracting parties are the insured and the insurance company, and the contract is made for the benefit of this third party "beneficiary." Unlike that of the assignee of the policy who is the owner thereof, the interest of the beneficiary, under a policy in which the insured reserves the right to change the beneficiary, is, until death of the insured intervenes, that of a mere expectancy or an incompleted gift, always subject to be defeated by a change of bene-

**Editor's Note*—The *Bulletin* will be pleased to accept for publication reviews of, and comments on, recent decisions; and members of the bar are urged to co-operate with Mr. Marks in making *Case Notes* a noteworthy feature of the *Bulletin*. Reviews should be mailed to the *Bulletin* office.

ficiary. *Heeft v. Supreme Lodge, etc.*, 113 Cal. 91; *New York Life Insurance Co. v. Dunn*, 46 Cal. App. 203; *New York Life Insurance Co. v. Bank of Italy*, 60 Cal. App. 602. Certain rights given to the owner of the policy by the usual life insurance policy, are enjoyed by the assignee of the policy in the same manner as by the owner; for example, (a) to surrender the policy for its cash or surrender value; (b) to surrender the policy for a paid-up policy; (c) to have the policy automatically extended from the date of default of premiums; (d) to borrow upon the policy up to the full surrender value; (e) to have the beneficiary changed; (f) to control the method of payment to the beneficiary; (g) to receive all dividends earned, or to use them to apply on the premiums or to purchase additional insurance.

The beneficiary, however, enjoys none of these rights; he is interested only in receiving the amount named in the policy upon the death of the insured.

Here is a good illustration of the value to the attorney of a knowledge of the basic principles of insurance. A proper understanding of these principles would guide the attorney in determining the theory of his case.

HARRY GRAHAM BALTER.

Thomas B. Reed, when admitted to the Bar in California, was asked by Judge Wm. P. Wallace if he thought the Legal Tender Act, recently passed, was constitutional. Reed answered that he thought is was. Wallace thereupon said that another young man answered that question the same morning the other way. "We will recommend you both favorably, as we think that all young men who can answer great constitutional questions offhand ought to be admitted to the Bar."—*The Denver Bar Association Record.*

THE YEAR'S WORK

(Continued from Page 10)

GREAT NATIONAL MOVEMENT

Los Angeles Bar Association represents from a public viewpoint but a part of a great national movement. For many years leaders of the bar and pioneers among us have labored quietly but insistently and effectively toward certain ideals. Fortunately, needed reforms in the administration of justice are to be brought about not under the leadership of laymen, as in other lands; but, to the glory of the legal profession be it said, these reforms have been advocated and will be accomplished here by the profession itself. Such men as Chief Justice Taft, Elihu Root, Charles Evans Hughes, George W. Wickersham, Dean Roscoe Pound, and many others, are in the forefront of the reform movement. We are standing upon the threshold of great events in the legal profession. Just now the ideals and efforts of many brave spirits have become crystallized into definite courses and definite objectives. We shall be the beneficiaries of many years of patient pioneering by men to whom the profession owes a deepest debt of gratitude.

REFORMS ADVOCATED BY THE BAR

To what reforms does the bar throughout America stand committed which will result in the maintenance of the judicial arm of the government upon its proper plane of dignity, efficiency and public respect? First of all, an integrated bar. This means ultimately a better educated, a duly qualified and a more ethical profession, better able to render service to the public in the administration of justice. It will mean that the bar in making its recommendations for the improvement of the judicial system will speak with one authorized voice the sentiments of the entire profession. It will result in solidarity, unity and fraternity.

INTEGRATION OF THE STATE BAR

The greatest aid to ultimate reforms in the administration of justice in this State will be effected by the passage of Senate Bill No. 9, providing for the organization of the State Bar. Fortunately, the present Governor is sympathetic with the ideals of the legal profession and is strongly in favor of this bill. Some time ago I received a letter from him in which he said, concerning the measure: "It seemed to me a good measure when it

passed, and I regard it as a good measure now. * * * Accordingly, you may quote me as being from the very first in favor of the bill and with the purposes it seeks to serve."

Simplification of Court Procedure

The bar stands for simplification of procedure in consonance with the informality and efficiency of the times. To this end it favors the abolition of statutory procedural rules with their rigidity and permanency, restoring to the courts the power and duty to prescribe simple and elastic rules of practice. It is strange indeed that because of the present statutory rules, which are in many respects the most complex and archaic of any civilized country on the globe, our courts have become congested, ineffective and inefficient, the result being that instead of overhauling our system and keeping up with the times, the people have in resentment turned over to commissions field after field of social transactions and controversies that formerly were under the jurisdiction of the courts and have conferred upon these lay boards power to make their own rules of procedure, but have apparently been reluctant to extend the same privilege to courts expert in the settlement of disputes. It is a curious coincidence that within the past. three weeks I have participated in proceedings before three different commissions. In all three evidence was presented and a trial of issues had. During the same period I also gave attention to briefs in a proceeding filed in the District Court of Appeal in a case in which I am one of the plaintiffs and in which the claim is made by the defendant that the Superior Court has no jurisdiction to review the findings and orders of the State Water Commission. To one who has studied and enjoyed the niceties and orderliness of the long-established procedure of the courts, the practice before a commission furnishes food for thought. One cannot help but admire, however, the straightforwardness of the method and the ever obvious objective of the proceedings. We must confess that in our courts some of us take an undue pride in the rules of the game. The over-emphasis of the adjective side of the law has created and accentuated a gaming spirit in American courtrooms. Under the rules in American courts American lawyers develop into excellent poker players. Under the English system, on the other hand, there are no secrets and no surprises. Facts fully known to both sides are in a simple, common sense manner presented and argued. Objections as to form are unheard of. As all documents must have been exhibited to the other side before the trial of the case, no time is consumed in "laying a foundation" and similar dilatory performances. There is now a proposal to enforce contractural provision for settlement of commercial disputes by arbitration. This will deprive the courts of another considerable portion of their business. The obvious advantage to the public of resorting to commissions, even though they be composed in some instances of untrained laymen, is that of getting the thing done. There is some virtue in the historic epigram of a former well known local Superior Court judge who was wont to exclaim with pride: "I do not decide rightly as often as some of them, but I decide a d—n sight quicker." The demand for simplicity of procedure and expedition in results is one which must be answered by the courts and by the bar or it will be answered by the commission.

Better Judges

The bar stands for the selection of the best qualified judges, and everywhere throughout America, bar associations are engaging actively in the aid of such selection. The bar stands for higher judicial salaries, for it has been found by sad experience, particularly in metropolitan communities, that it is impossible to maintain high judicial standards unless adequate compensation is paid. Bills have been introduced in the California Legislature providing for substantial increases in salaries, particularly in the centers of population. The salaries proposed more nearly approach those in eastern states, although still less than are paid in many instances. It is sincerely to be hoped that some means ac-

ceptable to the authorities at Sacramento and the Supervisors of the various counties throughout the State will be found to accomplish this much desired result.

Uniform State Laws

The bar is working for uniform State laws to facilitate commercial transactions and a more general knowledge of the laws applicable thereto. The bar has succeeded in having passed in this State the Uniform Warehouse Receipts Act, the Uniform Negotiable Instruments Act and the Uniform Bills of Lading Act. In other States Uniform Sale of Goods, Partnership, Limited Partnership, Proof of Statutes, Uniform Board of Commissioners and other important uniform acts have been adopted. In California these acts were passed, but were twice vetoed by Governor Richardson upon the specious ground that they would soon be amended and no longer uniform, notwithstanding the fact that the three uniform acts heretofore adopted have never been amended except at the specific request of the American Bar Association for their gradual improvement in uniformity with similar laws in other states.

Judicial Council

The bar favors a judicial council which shall have full administrative control over all of the courts of the state. This would seem an obvious improvement and one dictated by every consideration of efficiency and common sense. The Judicial Council of California by reason of the high standing of its membership starts its work with the full confidence of the bench and bar of the State. It is to be hoped, however, that duties will not be imposed upon it and results expected beyond the proper scope of the activities of such administrative agency. It is in my humble judgment no part of the function of a judicial council to provide for the trial of litigation in any county by transfer of judges from another county, except in times of emergency. It is certainly no proper part of the Judicial Council plan to provide for the trial of the normal amount of litigation in any county by resort to itinerant judges.

If there is one principle enthroned in the heart of the American citizen it is that of local self-government. In Los Angeles County by reason of its tremendous growth and constantly increasing population it will no doubt require at least ten additional departments of the Superior Court sitting full time to clear the calendars and keep up with future business of the courts. If it is the intention of the Judicial Council that judges from distant counties are to occupy these ten departments and additional departments if needed in the future, every member of the bar, every civic organization, every citizen of the County of Los Angeles should at this time make vigorous protest. Under the elective system we are at least entitled to the officers that we ourselves elect and who are answerable to those who elect them for at least a certain degree of honesty, ability and propriety. Los Angeles County pays its due proportion of governmental expense and it is entitled upon that ground to have judges sitting in its courts who are not strangers to its citizenry and who are responsible to its electors. Furthermore, outside judges sitting continually in our courts are an added expense over those who could be provided by law and elected from Los Angeles county. Visiting judges will be paid the same salary that Los Angeles judges receive, and in addition thereto under the law they will be allowed their maintenance which amounts to $300 per month. In other words, for ten departments it will cost the public $36,000 a year more than it would to provide additional judges from our own county. What is true in this regard is true in several other counties of the state. The "passing of the buck" between county and state in this matter does not help the citizen. The entire bill is paid by him in the long run. I for one believe that the Judicial Council should recommend to the Legislature and to the Governor of the State the creation of an appropriate number of judgeships in each county where the volume of business is such that additional judges are needed to keep up with the current busi-

ness. The Judicial Council will have valuable work to do if it confines itself to provision for emergencies where through some unusual situation the courts in various counties are behind in their work, and above all, in the supervision of work actually done by the judges throughout the state. The mere fact that the Judicial Council is requiring periodical reports as to condition of calendars of the various judges with statistical data as to the amount of work accomplished, and has power to recommend businesslike methods tending to the expedition of business, will accomplish results of far-reaching consequence and of which the entire profession will be proud.

Restatement of the Law

The bar has given encouragement to the effort of the American Law Institute in the restatement of the law. It is hoped that this restatement will gradually effect uniformity in the decisions of the courts of the various jurisdictions. During the last five years sixty thousand statutes have been passed in the United States and sixty-five thousand decisions have been rendered by courts of last resort. The descendants of the ten commandments have become necessarily prolific. The literature of the law is fast becoming insurmountable, if not incomprehensible. True it is, that the advancements in business, manufacture and social intercourse are such that complexity and confusion in rules of conduct are, perhaps, to some extent, inevitable; but an effort must be made in the administration of justice, as in all other lines of human endeavor in these complicated times, to keep the channel of advancement clear and unobstructed. The debris must be cast aside. The inconsequential must be discarded. The legal profession cannot retard the turning of the wheel. The efforts of the bar and of the bench to establish modern efficiency in the administration of justice are gaining, and deserve the confidence, sympathy and co-operation of the public and of the press. The year begins with brightest prospects for the accomplishment of needed reforms.

Los Angeles, March 1, 1927.